

Dave Moon/R8/USEPA/US

07/28/2009 04:18 PM

To "Bukantis, Bob" <bbukantis@mt.gov>

cc Tina Laidlaw/MO/R8/USEPA/US@EPA, Tonya Fish/R8/USEPA/US@EPA

Subject Re: Variance Memo

Hi Bob -

Here you go. Attached is the new memo, plus a 1985 memo. Both on variances.

Dave Moon

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"Bukantis, Bob" <bbukantis@mt.gov>

07/28/2009 04:05 PM

To Dave Moon/R8/USEPA/US@EPA

cc

Subject

Hi Dave,

At our last Nutrients Advisory Council meeting I think you referenced a memo on case law on variances that we were going to attach to the meeting minutes and get up on the group's web page. Do you recall the memo, and if so can you send it? Thanks!

Bob Bukantis

Water Quality Standards Program Manager

Montana Department of Environmental Quality

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WASHINGTON, D.C. 20460

MAR 15 1985

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Variances in Water Quality Standards

TO: Water Division Directors

Numerous questions have been raised regarding the granting of variances to water quality standards. The Preamble to the water quality standards regulations discusses limiting the granting of a variance that "... based on a demonstration that meeting the standard would cause substantial and widespread economic and social impact, the same test as if the State were changing a use..."

A interpretation by our Office of General Counsel, provides a better determination on what factors can be considered in allowing variances from water quality standards. The OGC interpretation is that any of the factors recognized in the regulation for justifying a stream use downgrade, not just the substantial and widespread economic and social impact test, may be used to support a variance.

Our previous interpretation was somewhat illogical as it allowed more opportunity for a permanent change in standards than it did for a temporary, short-term change which could be granted by a variance. Under Section 510 of the Clean Water Act, States have the right to establish more stringent standards than suggested by EPA. Therefore, as long as any temporary water quality standards modification conforms to the requirements established in Section 131.10 (g) of the regulation for downgrading uses, such an approach is acceptable as it would lead to only a temporary change to a water quality standard rather than a downgrade, and thus would be more stringent than the Federal requirements.

This interpretation does not change the regulation which provides that States may have general policies affecting the application and implementation of standards. It does affect the discussion of variances contained in the Preamble to the regulation and the guidance included in the WQS Handbook, page 1-9. No other aspect of the variance policy and guidance is altered by this new interpretation. This memorandum should be kept as part of your permanent file for interpreting water quality standards.

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Overall, we expect the impact of this change to be minimal as the discussion of variances appears to far outweigh its actual affects on the program. Often the confusion surrounding variances obscures the fact that what is really being discussed are specialized permit conditions, scheduling adjustments, site-specific criteria, or actual downgrading actions.

Edwin L. Johnson, Director
Office of Water Regulations
and Standards (WH-551)

c c : Bill Whittington
Peter Perez
Cathy Winer
Net Notzen

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